Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States

LEXMARK INTERNATIONAL, INC.,
Petitioner,

v.

RONALD R. SNOWDEN,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether under this Court's holding in Landgraf v. USI Film Products, 511 U.S. 244, 128 L.Ed.2d 229, 114 S. Ct. 1483 (1994) a copyright infringement in violation of 18 U.S.C. §2319 can serve as a predicate act for the purposes of establishing a pattern of racketeering when the violation occurred prior to the amendment to RICO[1] adding copyright infringement to the list of RICO predicate offenses?

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[1] Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §1961, et seq.

LIST OF PARTIES

Petitioner is Lexmark International, Inc., a corporation with no parent companies. There are no publicly-held corporations which own ten percent or more of its stock.

Respondent is Ronald R. Snowden. The parties in the proceedings before the Sixth Circuit Court of Appeals additionally included Doug Landers, Wayne Moore, Dudley Gravitt, Fritz Stollger and Guardsmark, Inc.

In the proceedings before the United States District Court for the Eastern District of Kentucky, Lexington Division, Reed "Mac" McClintock and McClintock Associates, Inc. were also joined as parties.

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Lexmark International, Inc., petitions for a Writ of Certiorari to review the January 11, 2001 Opinion of the United States Court of Appeals for the Sixth Circuit which affirmed the Memorandum, Opinion and Order of the U.S. District Court for the Eastern District of Kentucky, Lexington Division, entered on August 9, 1999.

OPINIONS BELOW

The August 9, 1999 Memorandum, Opinion and Order of the U.S. District Court for the Eastern District of Kentucky is not published in any official or unofficial reporter. The Opinion of the United States Court of Appeals for the Sixth Circuit entered on January 11, 2001 is published as Snowden v. Lexmark International, Inc., 237 F.3d 620 (6th Cir. 2001).

JURISDICTION

This Petition seeks review of the United States Court of Appeals for the Sixth Circuit Opinion entered on January 11, 2001, which affirmed a Memorandum, Opinion and Order entered on August 9, 1999 by the U.S. District Court for the Eastern District of Kentucky, Lexington Division. There were no petitions for rehearing brought before the Sixth Circuit Court of Appeals and no orders granting the extension of time to file a Petition for Writ of Certiorari.

The Petition seeks to invoke the jurisdiction of this Court to review the Opinion of the United States Court of Appeals for the Sixth Circuit under 28 U.S.C. § 1254.

STATUTES

The federal statute involved in this review is 18 U.S.C. § 1961 (5) which provides:

> (5) 'pattern of racketeering activity' requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

STATEMENT OF THE CASE

This controversy arose after Petitioner, Lexmark International, Inc. ("Lexmark"), terminated the employment of Ronald R. Snowden ("Snowden") following an investigation of employee theft of computer memory chips from Lexmark's warehouse. After the initial theft was discovered in January, 1996, Lexmark installed video cameras in the warehouse which recorded a second theft on March 9, 1996. Snowden was identified as one of the two persons depicted on the video tape of the March 9, 1996 theft and, accordingly, was fired by Lexmark.

Snowden was indicted by the Fayette County, Kentucky Grand Jury for burglary and theft, but because of the poor quality of the surveillance video tape recording of the theft, the prosecutor dismissed the charges. Snowden in turn filed suit against Lexmark and various members of management. Lexmark removed the case to federal court and

asserted a RICO counterclaim against Snowden.[2]

Among the predicate acts relied upon by Lexmark to establish the RICO violation were the March 9, 1996 theft of the computer chips (in violation of 18 U.S.C. §659) and criminal copyright infringements (in violation of 18 U.S.C. §2319). The copyright infringements arose out of Snowden's membership in the Assassin's Guild, a computer bulletin board service which dealt in illegal pirated computer software, and Snowden's operation of a bulletin board service called Transylvania 286. These activities predated the July 2, 1996 effective date of the Anticounterfeiting Consumer Protection Act that added copyright infringement to the list of RICO predicate offenses.

On August 9, 1999, the District Court issued a Memorandum, Opinion and Order granting Snowden summary judgment on Lexmark's RICO claims. Lexmark appealed to the United States Court of Appeals for the Sixth Circuit ("Sixth Circuit") which affirmed.[3] The Court found that Snowden's copyright infringement activity could not serve as a RICO predicate act since such activity occurred prior to the addition of copyright infringement to the list of predicate acts. (Appendix, p. 7a).

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[2] Jurisdiction in the District Court was proper pursuant to 28 U.S.C. §§1331, 1441, and 18 U.S.C. §1964.

[3] The appellate jurisdiction of the Sixth Circuit was grounded in 28 U.S.C. §§1291 and 1294.

ARGUMENT

This Court in Landgraf v. USI Film Products, 511 U.S. 244, 128 L.Ed.2d 229, 114 S. Ct. 1483 (1994) set forth the guidelines governing the determination of whether a federal statute enacted after the events which are the subject of litigation is nonetheless applicable to such litigation. It is respectfully suggested that the Sixth Circuit failed to adhere to such guidelines when addressing the retroactive application of the Anticounterfeiting Consumer Protection Act in the proceedings below. Under the teachings of Landgraf, Snowden's copyright infringements constituted a predicate act, notwithstanding the fact that such criminal conduct predated the effective date of the Anticounterfeiting Consumer Protection Act which added copyright infringement to the list of predicate offenses.

I. CONGRESS EXPRESSLY PRESCRIBED THE RETROACTIVE REACH OF RICO

When addressing the retroactive application of a statute, "the court's first task is to determine whether Congress has expressly prescribed the statute's proper reach. If Congress has done so, of course, there is no need to resort to judicial default rules." Landgraf v. USI Film Products, 114 S. Ct. at 1505. The Sixth Circuit attempted to complete this task, but ultimately erred in finding that "Congress did not prescribe the reach of the Anticounterfeiting Act." (Appendix, p. 10a). Such finding is shortsighted, requiring Congress to expressly address the reach of each particular amendment to RICO, when it had already prescribed the global reach of the statute in its entirety. Congress specifically allowed for a retroactive application when determining what criminal violations qualify as predicate acts. See 18 U.S.C. §1961(5). It was not required to make any further declarations of intent.

18 U.S.C. §1961(5) provides:

> (5) 'pattern of racketeering activity' requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

This statute evidences the Congressional intent that a pattern of racketeering activity can include a criminal violation which occurred prior to the date that the offense became a predicate act under RICO, so long as one of the other predicate acts occurred after RICO's effective date. By defining pattern of racketeering activity in this fashion, Congress avoided an ex-post facto challenge to the statute. United States v. Campanale, 518 F.2d 352, 365 (9th Cir. 1975), cert. denied, 423 U.S. 1050 (1976); United States v. Brown, 555 F.2d 407, 417 (5th Cir. 1977), cert. denied, 435 U.S. 904 (1978).

The allegations against Snowden satisfy the requirements of 18 U.S.C. §1961(5). It is not challenged that Snowden's copyright infringements predated the amendment adding copyright infringement to the list of predicate offenses. However, the other predicate act[4] relied upon by Lexmark to

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[4] The earlier theft discovered in January, 1996 which prompted the installation of video cameras in the warehouse was also relied upon by Lexmark below as a predicate act. However, since the Sixth Circuit criticized the strength of Lexmark's evidence linking Snowden to the initial theft (Appendix, p. 6a), and Lexmark acknowledged that the January and March thefts alone would not

establish the pattern of racketeering occurred after the criminal violation became a predicate offense. At the time of Snowden's theft of the computer chips which was caught on the Lexmark surveillance tape there was no question that such offense, in violation of 18 U.S.C. §659, constituted a predicate act. This predicate offense occurred "after the effective date of [RICO]." 18 U.S.C. §1961(5). Thus, Lexmark relied upon a criminal violation which occurred prior to the offense becoming a predicate act and on a criminal violation which was already designated as a predicate offense at the time it was committed. The requirements of 18 U.S.C. §1961(5) were met. Lexmark, therefore, should have been permitted to rely on the copyright infringements as one of the predicate acts necessary to establish a RICO violation by Snowden.

The Sixth Circuit rejected this reasoning, finding that the RICO amendment could be applied retroactively only if the second predicate act likewise involved a copyright infringement which occurred after the effective date of the amendment. (Appendix, p. 10a). This finding ignores the comprehensive scope of RICO. RICO allows for a host of different kinds of predicate acts which form a pattern of racketeering activity. Assuming the requisite continuity and relationship requirements are met, see H.J., Inc. v. Northwestern Bell Telephone Co., 492 U.S. 229, 106 L.Ed.2d 195, 109 S. Ct. 2893, 2900 (1989), it is of no consequence that the predicate acts involve separate criminal violations. 18 U.S.C. §1961(5) requires only that one of the predicate acts be a violation of RICO at the time it occurred.

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constitute a "pattern" because they were too close in time, discussion of such theft is omitted from the Petition.

II. APPLICATION OF THE AMENDMENT TO SNOWDEN DOES NOT RESULT IN NEW LEGAL CONSEQUENCES

Even if 18 U.S.C. §1961(5) is not viewed as prescribing RICO's backward-looking reach, the application of the amendment to Snowden must be upheld since it does not "impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." Landgraf v. USI Film Products, 511 U.S. 244, 128 L.Ed.2d 299, 114 S. Ct. 1483, 1505 (1994). As this Court recognized, "[a] statute does not operate 'retrospectively' merely because it is applied in a case arising from conduct antedating the statute's enactment ... Rather, the court must ask whether the new provision attaches new legal consequences to events completed before its enactment." Landgraf v. USI Film Products, 114 S. Ct. at 1499. Snowden is accused herein of engaging in a pattern of racketeering activity based in part upon the theft of computer chips in violation of 18 U.S.C. §659. Such conduct was violative of RICO even before the enactment of the Anticounterfeiting Consumer Protection Act. Thus, Snowden's exposure under RICO was not increased by application of the amendment to his racketeering activity.

The 1996 amendment to RICO which added 18 U.S.C. §2319 as a predicate offense did not create a whole new cause of action or category of damages under RICO. To the contrary, the amendments simply added an existing criminal offense to the list of criminal violations which may serve as predicate acts under RICO. The amendment did not proscribe conduct which was previously legal; copyright infringement has been defined as criminal conduct since the enactment of 18 U.S.C. §2319 in 1982. The amendment did not allow for the imposition of civil liability where none was previously

available; civil liability for copyright infringement already existed under 17 U.S.C. §504. Since Snowden was, through the theft of computer chips, already subject to the RICO penalties, his exposure for the combination of theft and the copyright infringements remained the same following the effective date of the amendment.

The court in Wiener v. Napoli, 772 F. Supp. 109 (E.D.N.Y. 1991) addressed a similar scenario. The plaintiff therein brought a RICO action against several attorneys alleging bank fraud, as prohibited by 18 U.S.C. §1334, as a RICO predicate act. The defendants moved to dismiss, arguing in part, that a violation of 18 U.S.C. §1334 was not included as a RICO predicate offense under the amendment to 18 U.S.C. §1961(5) until after the bank fraud occurred. Although this decision predates Landgraf v. USI Film Products, 511 U.S. 244, 128 L.Ed.2d 229, 114 S. Ct. 1483 (1994), the court's reasoning in addressing such argument is instructive. The court rejected the contention that allowing a retroactive reach of the statute would subject the defendants to increased penalties. It noted:

> At the time of the alleged offenses, bank fraud was clearly a statutorily punishable offense. Consequently, the defendants were on notice that such a violation constituted a crime and could subject them to potentially heavy penalties.

Wiener v. Napoli, 772 F. Supp. at 116.

The court additionally found that retroactive application of the bank fraud amendment did not create "substantial inequitable results." It held: "There has been no 'creation' of a new offense but merely the inclusion of an existing offense as an

'act of racketeering activity' under a specific provision of the RICO statute." Wiener v. Napoli, 772 F. Supp. 109, 118 (E.D.N.Y. 1991).

Finally, the court acknowledged that its review should not be limited to the amendment to RICO, but must additionally consider the statute as originally enacted:

> The history of the RICO statute comports with the eventual inclusion of bank fraud and retroactive application of the amended provision. The RICO statute makes it unlawful to participate in the conduct of the affairs of an 'enterprise' through a pattern of 'racketeering activity' in interstate or foreign commerce. (citation omitted). Retroactive application of the bank fraud provision furthers the operation and legislative intent of the underlying statute.

Wiener v. Napoli, 772 F. Supp. at 118.

Coincidentally, the opposite result was reached by the court in Resolution Trust Corp. v. S & K Chevrolet, 868 F. Supp. 1047, 1062 (C.D. Ill. 1994), wherein the availability of treble damages under RICO was cited as the basis for finding that retroactive application of the bank fraud amendment would impermissibly increase the defendant's liability for past conduct. Unfortunately, neither the court in Wiener v. Napoli, 772 F. Supp. 109 (E.D.N.Y. 1991) nor the court in Resolution Trust Corp. v. S & K Chevrolet, 868 F. Supp. 1047 (C.D. Ill. 1994) addressed the specific language of 18 U.S.C. §1961(5).

In a related matter, the lower courts are additionally struggling with the issue of retroactive application of the

Private Securities Litigation Reform Act of 1995 which amended 18 U.S.C. §1964(c) to bar civil RICO claims arising from securities fraud. See Kolfenbach v. Mansour, 36 F. Supp.2d 1351, 1352 (S.D. Fla. 1999) for a review of the conflicting authorities. It is apparent from these lines of cases addressing the amendments to §1964(c) and §1961(5) that guidance from this Court is necessary to resolve the conflicting views as to how the teachings of Landgraf v. USI Film Products, 511 U.S. 244, 128 L.Ed.2d 229, 114 S. Ct. 1483 (1994) apply to RICO.

CONCLUSION

Petitioner, Lexmark International, Inc., urges the Court to grant this Petition to address the issue of whether copyright infringements which predate the Anticounterfeiting Consumer Protection Act can serve as a predicate act for the purpose of establishing a RICO violation.

Respectfully submitted on this 10th day of April, 2001.

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APPENDIX A

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 206

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 99-6216

RONALD R. SNOWDEN, *Plaintiff-Appellee*,	)
v.	)
LEXMARK INTERNATIONAL, INC.; DOUG LANDERS; WAYNE MOORE; DUDLEY GRAVITT; FRITZ STOLLGER, *Defendants-Appellants*,	)
GUARDSMARK, INC., *Defendant-Appellee*.	)

Appeal from the United States District Court
for the Eastern District of Kentucky at Lexington.
No. 97-00189--Henry R. Wilhoit, Jr., Chief District Judge.

Argued: December 5, 2000
Decided and Filed: January 11, 2001

Before: MERRITT, NELSON, and BATCHELDER, Circuit Judges

COUNSEL

ARGUED: Larry A. Sykes, STOLL, KEENON & PARK, Lexington, Kentucky, for Appellants. Charles W. Curry, Lexington, Kentucky for Appellee. **ON BRIEF**: Larry A. Sykes, David C. Schwetschenau, STOLL, KEENON & PARK, Lexington, Kentucky for Appellants. Charles W. Curry, Lexington, Kentucky, Thomas K. Herren, HERREN & ADAMS, Lexington, Kentucky, for Appellee.

OPINION

MERRITT, Circuit Judge. This civil case is brought under RICO, the Racketeer Influenced and Corrupt Organizations Act. Appellants are Lexmark, a manufacturer and retailer of computer printing products, and several employees involved in company security and management. Appellee Ronald Snowden is a former Lexmark employee. Lexmark alleges that Mr. Snowden stole computer chips from its warehouse and used them to distribute software via computer in violation of copyright laws. We agree with the District Court that appellants have failed to demonstrate a "pattern of racketeering." We therefore affirm summary judgment in favor of Mr. Snowden.

RICO was enacted as Title IX of the Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922 (codified as amended at 18 U.S.C. §§ 1961-1968). Section 1962(c) makes it unlawful for "any person employed by or associated with any enterprise engaged in, or the activities of

which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity . . . ." In order to establish a RICO violation, a plaintiff must show 1) two or more predicate offenses; 2) the existence of an "enterprise"; 3) a nexus between the pattern of racketeering activity and the enterprise; and 4) an injury to business. *VanDenBroeck v. CommonPoint Mortgage Co.*, 210 F.3d 696, 699 (6th Cir. 2000). The Supreme Court has described the pattern requirement as "the heart of any RICO complaint." *Agency Holding Corp. v. Malley-Duff & Assoc., Inc.*, 483 U.S. 143, 154 (1987). The statute defines a "pattern of racketeering activity" as requiring

> at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity

18 U.S.C. § 1961 (5). These instances of racketeering, listed at 18 U.S.C. § 1961(1), are known as "predicate acts."

I. Facts

Lexmark is an international corporation with world headquarters in Lexington, Kentucky. There, it assembles computer printing products that incorporate single in-line memory module chips called "SIMMS." Lexmark also sells SIMMS chips directly to customers. Computer chips designated for resale are stored in a warehouse on company

property. An inventory check in January 1996 revealed a number of missing units. Suspecting theft, Lexmark installed a video camera to monitor the storage area. On March 9, 1996, the camera recorded two men taking SIMMS chips from the warehouse. Lexmark management identified Ronald Snowden as one of the figures in the video and fired him in May 1996.

Until he was fired, Ronald Snowden was a 17-year employee at Lexmark who installed and repaired computer network server hardware. His interest in computers carried over into his personal life. He was a member of a computer "bulletin board service" called the "Assassin's Guild." A precursor of the Internet, a bulletin board service is an electronic forum connected by computers and modems that permits users to exchange files and text. The Assassin's Guild was an especially popular board, known for allowing users to download, or "pirate," commercial software in violation of copyright laws. Through lawsuits and an eventual settlement, Microsoft and Novell forced the board to shut down in April 1995. Mr. Snowden also hosted his own bulletin board called "Transylvania 286." As system operator, he ran the network, monitored problems, and configured the hardware. Mr. Snowden ceased to maintain the board after December 1995 and completely shut it down in March 1996. J.A. 134.

On the basis of the warehouse surveillance tape, Mr. Snowden was indicted by a Fayette County grand jury for burglary and theft. Because the video's poor quality diminished its evidentiary value, however, the prosecutor later dismissed the charges. Mr. Snowden then filed a civil RICO complaint against Lexmark in Kentucky circuit court. Lexmark removed the case and filed a RICO counterclaim,

alleging that Mr. Snowden stole the memory chips and used them to distribute computer software on the Assassin's Guild and Transylvania 286. According to Lexmark, Mr. Snowden's activity on these boards constituted criminal copyright infringement, which, along with the theft of the chips, formed a pattern of racketeering. Mr. Snowden abandoned his RICO claim and moved for summary judgment on Lexmark's counterclaim. The District Court granted the motion, and Lexmark now appeals.

Lexmark offers three predicate acts to support its claim of racketeering. It accuses Mr. Snowden of stealing SIMMS chips from interstate shipments in January and March of 1996 in violation of 18 U.S.C. § 659. It also charges Mr. Snowden with participating in criminal copyright infringement in violation of 18 U.S.C. § 2319. According to Lexmark, these three acts coalesce into a "software pirating operation." Appellant Br. at 13.

II. Discussion

In interpreting 18 U.S.C. § 1961 (5), the Supreme Court has developed a "continuity plus relationship" test by which otherwise disparate acts may be woven into a prohibited pattern of racketeering. *H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 240 (1989). The pattern requirement of a RICO action is satisfied by showing (1) a relationship between the predicate acts and (2) the threat of continued activity. *Saglioccolo v. Eagle Ins. Co.*, 112 F.3d 226, 229 (6th Cir. 1997) (citing *H.J. Inc.*, 492 U.S. at 240).

We need not probe the relationship among the predicate acts claimed in this case, however. Because

Lexmark has failed to show even the existence of two predicate acts, we do not reach the question of their relatedness or continuity.

A. The Missing SIMMS Chips

Lexmark's only proof of wrong-doing is the surveillance tape of the March theft. Mr. Snowden concedes that his identification in the video is sufficient to withstand summary judgment. Appellee Br. at 8. Viewing the facts in the light most favorable to Lexmark, we will concede that there may be a genuine factual dispute about whether the missing chips were taken from an "interstate shipment" as required by 18 U.S.C. § 659. Thus, for purposes of this summary judgment motion, Lexmark may properly claim the March theft as a RICO predicate act that implicates Mr. Snowden.

The same cannot be said for the other alleged theft. There is simply no evidence that Mr. Snowden stole Lexmark chips in January 1996. In fact, there is no evidence that *anyone* stole the chips. What Lexmark calls an "unexplained shortage" might just as well have been misplaced or misdelivered inventory. Appellants have not shown otherwise, instead speculating: "A logical inference is that the same persons who stole the SIMMS in March were also responsible for the similar theft from the same location in January." Appellant Br. at 11. This wholly unsubstantiated claim cannot serve as a predicate act, even at this stage in the proceedings. "To withstand a defense motion for summary judgment, [the plaintiff] must adduce some concrete evidence on which a reasonable juror could return a verdict in his favor." *Frank v. D'Ambrosi,* 4 F.3d 1378, 1384 (6th Cir. 1993) (affirming

summary judgment against a RICO plaintiff who offered only "wild and unsupported statements" to support his claim) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986)).

B. The Alleged Copyright Infringement

As a second predicate act, Lexmark also claims that Mr. Snowden participated in criminal copyright infringement. Mr. Snowden operated a bulletin board service called "Transylvania 286" and was a member of another board called the "Assassin's Guild." The latter was known for distributing software in violation of copyright laws. Lexmark does not claim a proprietary interest in the copyrights, however. The only connection between Lexmark and the alleged infringement is its assertion that "it is logical to infer that at least some of the stolen SIMMS were utilized as components of the illegal BBSs [bulletin board services] which Snowden operated or participated in." Appellant Br. at 14-15. Lexmark further maintains "it is also likely that the stolen SIMMS were sold through Snowden's BBS." *Id.* at 15.

Even assuming that Mr. Snowden participated in computer piracy--and the facts are by no means clear concerning his involvement--this conduct does not bring him within reach of RICO. Copyright infringement became a RICO predicate act as of July 2, 1996. *See* the Anticounterfeiting Consumer Protection Act of 1996, Pub. L. No. 104-153, § 3, 110 Stat. 1386 (adding criminal copyright infringement, 18 U.S.C. § 2319, to the list of RICO predicate offenses found at 18 U.S.C. § 1961(1)(B)). Lexmark acknowledges that Mr. Snowden's alleged infringement took place before RICO was amended to include copyright violations. Appellant Br. at 17. According to Lexmark,

though, the amendment should have retroactive effect, reaching back to subject Mr. Snowden's computing activities to RICO penalties. It cites a case from New York for the proposition that because copyright infringement was unlawful before 1996, its inclusion under RICO "does not introduce a new crime." *Wiener v. Napoli*, 772 F. Supp. 109, 116 (S.D.N.Y. 1991) (penalizing bank fraud retroactively as a RICO predicate offense).

Significantly, *Wiener* was decided before *Landgraf v. USI Film Products,* 511 U.S. 244 (1994). In *Landgraf,* the Supreme Court considered the scope of the 1991 Civil Rights Act, concluding that the petitioner was not entitled to a jury trial on a sexual harassment action commenced in 1989. Examining the "antiretroactivity principle" embedded in the Constitution, the Court observed:

> When a case implicates a federal statute enacted after the events in suit, the court's first task is to determine whether Congress has expressly prescribed the statute's proper reach. If Congress has done so, of course, there is no need to resort to judicial default rules. When, however, the statute contains no such express command, the court must determine whether the new statute would have retroactive effect, i.e., whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed. If the statute would operate retroactively, our traditional presumption teaches that it does not

> govern absent clear congressional intent favoring such a result.

Id. at 280.

In this case, the District Court found that Congress had not indicated the reach of the Anticounterfeiting Consumer Protection Act. Lexmark counters this legislative silence by suggesting that Congress intended a broad retroactive design for RICO as enacted in 1970. Appellants argue that the definition of "pattern of racketeering activity" is backwards-looking by negative implication. *See* 18 U.S.C. § 1961(5). The Senate Judiciary Committee commented on this provision in 1969, noting:

> One act in the pattern must be engaged in after the effective date of the legislation. This avoids the prohibition against ex post facto laws, and bills of attainder. Anyone who has engaged in the prohibited activities before the effective date of the legislation is on prior notice that only one further act may trigger the increased penalties and new remedies of this chapter.

S. REP. NO. 91-617, at 158 (1969).

Lexmark interprets this language as also authorizing retroactive application of amendments to RICO. It is true that Congress swept in acts committed before RICO's effective date of October 15, 1970, as predicate offenses. Appellants would extrapolate from the 1970 legislation to the 1996 amendment. But Lexmark fails to complete the analogy

between the first passage of RICO and its subsequent revision. A RICO action could incorporate acts before October 15, 1970, only if the defendant *also* engaged in prohibited activities *after* that date. If the amendments are to reach back in the same manner as the original legislation, then they too must have the safeguard of "prior notice." In this case, Mr. Snowden's infringing activity before July 2, 1996--the effective date of the Anticounterfeiting Consumer Protection Act--cannot serve as a predicate act unless he *also* infringed *after* July 2, 1996. This he did not do. The Anticounterfeiting Act simply put him on notice that future copyright violations could trigger RICO and provide a basis for incorporating prior acts of infringement. Because Lexmark does not claim that Mr. Snowden committed any act of racketeering after July 2, 1996, the alleged infringement before that date cannot be included as a predicate act under RICO.

We agree with the District Court that Congress did not prescribe the reach of the Anticounterfeiting Act. Furthermore, we are unpersuaded that RICO's legislative history from 1970 now dictates retroactive application of the 1996 amendment when Mr. Snowden has not engaged in any racketeering after its effective date. Moreover, the Due Process and Ex Post Facto Clauses do not permit criminal penalties to be imposed retroactively. *See generally* NORMAN J. SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 41.03, at 344 (5th ed. 1993). Since RICO is first a criminal statute that only piggy-backs civil remedies, it should be interpreted, for retroactivity purposes, as a criminal statute. *See, e.g.*, Michael S. Rafford, *The Private Securities Litigation Reform Act of 1995: Retroactive Application of the RICO Amendment,* 23 J. LEGIS. 283, 288 (1997) ("New burdens on past transactions are still unjust whether they be in the form of

criminal or civil sanctions . . . . Statutes such as RICO, that contain both criminal and civil causes of action, illustrate the problems of only prohibiting retroactive criminal laws. The prohibition against ex post facto laws protects a RICO defendant charged with predicate acts of fraud, extortion and gambling when the suit is brought by the government. Nevertheless, when that same suit is brought by a private party, only a presumption against retroactivity exists. Moreover, the only difference may be the plaintiff since the government can seek injunctive as well as monetary relief against RICO defendants. The focus in both situations should be the conduct in question."). Though infringement was a criminal offense before 1996, its inclusion in the RICO scheme adds new layers of criminal sanctions and civil penalties not previously present. *See, e.g.*, 18 U.S.C. § 1964(c) (authorizing the recovery of treble damages under RICO). Thus, the amendment adding copyright infringement to RICO would clearly "increase a party's liability for past conduct" under *Landgraf*. Absent clear congressional intent, the judicial default rules outlined in *Landgraf* raise a presumption against retroactivity. Lexmark has not overcome this presumption. *Cf. Scott v. Boos*, 215 F.3d 940 (9th Cir. 2000) (refusing to apply the Private Securities Litigation Reform Act of 1995 retroactively, which amended RICO to remove securities fraud as a predicate act). *Accord Mathews v. Kidder; Peabody & Co., Inc.*, 161 F.3d 156 (3d Cir. 1998).

III. Conclusion

To prevail on a RICO claim, a plaintiff must show two acts of racketeering activity as a "minimum necessary condition." *H.J. Inc.*, 492 U.S. at 237. The allegation that

Mr. Snowden was involved in the January theft is wholly unsubstantiated. Moreover, even assuming that Mr. Snowden violated copyright law, principles of fairness and prior notice militate against retroactive application of RICO penalties. To support their claim of racketeering, then, appellants at most can offer a single theft from an interstate shipment. We agree with the District Court that this cannot satisfy the "pattern" requirement imposed by RICO. Accordingly, the grant of summary judgment in favor of Mr. Snowden is AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

[Filed January 11, 2001]

No. 99-6216

RONALD R. SNOWDEN, *Plaintiff-Appellee*,	)
v.	)
LEXMARK INTERNATIONAL, INC.; DOUG LANDERS; WAYNE MOORE; DUDLEY GRAVITT; FRITZ STOLLGER, *Defendants-Appellants*,	)
GUARDSMARK, INC., *Defendant-Appellee*.	)

Before: MERRITT, NELSON, and BATCHELDER, Circuit Judges

JUDGMENT

On Appeal from the United States District Court for the Eastern District of Kentucky at Lexington.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION WHEREOF, it is ORDERED that the judgment of the district court granting summary judgment to plaintiff Ronald R. Snowden is AFFIRMED.

ENTERED BY ORDER OF THE COURT

/s/_____
Leonard Green, Clerk

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON

[Filed August 9, 1999]

CIVIL ACTION NO. 97-189

RONALD R. SNOWDEN, *Plaintiff*,	)
v.	)
LEXMARK INTERNATIONAL, INC, ET AL. *Defendants*.	)

MEMORANDUM OPINION & ORDER

This matter is before the Court on Plaintiff's construed motion for summary judgment [Record No. 155]. Having reviewed the pleadings and being otherwise sufficiently advised, the Court grants Plaintiff's motion.

I. Introduction

Ronaid Snowden, a former Lexmark employee, filed this lawsuit in state court on April 30, 1997. Along with

numerous state causes of action, Snowden alleged that Lexmark had violated 18 U.S.C. § 1961(c), one subdivision of RICO. Lexmark removed the case here. In its Answer, Lexmark included a counterclaim alleging state law violations and a violation of RICO. On October 30, 1998, Lexmark filed a motion for summary judgment addressing Snowden's state law claims and his claim under RICO. While Snowden's response addressed the merits of his state claims, the portion of his response reserved for RICO simply stated: "Plaintiff chooses not to rebut Defendants' legal arguments on his RICO claims; and Plaintiff submits that the same legal argument should be applied to Defendants' RICO claims in their counterclaim, and which should be dismissed." The Court construed that portion of Plaintiff's response as a motion for summary judgment as to Lexmark's RICO counterclaim. After dismissing Snowden's RICO claim on the merits, the Court withheld resolution of Snowden's state law claims, and provided Lexmark with time to respond to Snowden's construed motion for summary judgment. Lexmark has so responded and it is this matter that is now up for resolution.

II. Factual Background

A substantial portion of the history between these parties has already been recited, see [Record No. 163] and will not be reiterated here. For the purposes of this motion, only the following facts need be stated. From 1987 to early 1996, Snowden operated a bulletin board service ("BBS") called "Transylvania 286."[1] This BBS had 80-85 regular users

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[1]A bulletin board services allows numerous computer users to communicate and exchange information through a central

and a total of over 300 members over the years it operated. Snowden was also a member and regular user of the "Assassin's Guild," a BBS operated by a man named Scott Morris. From its commencement in 1990, the Assassin's Guild BBS was devoted entirely to the sharing of illegally pirated software. This illegal software was supplied to the Assassin's Guild BBS by its various members as well as its international parent group, "Pirates with Attitude." In April of 1995, the Assassin's Guild was shut down when Morris was sued by Microsoft and Novell for copyright violations. As a result of that litigation, Morris had to pay $70,000 and convey all of his BBS equipment to Microsoft and Novell in settlement. There is no allegation that Snowden played a part in the copyright litigation.

In January of 1996, Lexmark discovered that significant numbers of "SIMMS" memory chips were being taken from Building 006 where they were being stored for shipment to Lexmark customers. In an effort to ascertain the source of the problem, Lexmark security installed a video camera to monitor the area where the SIMMS were being stored. On March 9, 1996, the camera recorded the image of two figures stealing SIMMS. One of these figures was subsequently identified by Lexmark personnel as Snowden. Of course, the quality of this tape and Lexmark's accusations that

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computer using modems and the telephone lines. Computer software programs can be posted on the bulletin board and "downloaded," i.e., copied onto a computer disc by users of the system. Similarly, users of the system can "upload" software from their individual computer onto the BBS, where it can be downloaded by other users.

it depicts Snowden, is what appears to have begun this whole lawsuit in the first place.

III. Racketeer Influenced and Corrupt Organization Act ("RICO")

Lexmark's counterclaim alleges that Snowden's conduct violated § 1962(c), one of RICO's prohibited activities. Section 1962(c) reads as follows: "It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity . . . ." The Supreme Court has held that, "[a] violation of § 1962(c) . . . requires (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity." Sedima, S.P.R.L. v. Imrex Co., Inc., 473 U.S. 479, 496 (1985).

The phrase, "racketeering activity" is a defined one. Referred to most often as "predicate acts," § 1961(1) provides an exclusive list of what conduct may [sic] deemed racketeering activity. Section 1961 also defines "pattern of racketeering activity." Pursuant to § 1961(5), a pattern of racketeering activity requires "at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity." Simply put, "[a] pattern requires at least two 'predicate acts' of racketeering activity within ten years of each other." Vemco, Inc. v. Camardella, 23 F.3d 129, 133 (6th Cir. 1994).

In Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479 (1985), the Court first observed that RICO's definition of a "pattern of racketeering activity " "does not so much define a pattern of racketeering activity as state a minimum necessary condition for the existence of such a pattern." H.J., Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229, 237 (1989)(citing Sedima, 473 U.S. at n. 14 (1985)). The H.J. Court went on to explain "that the pattern requirement is satisfied by showing (1) a relationship between the predicate acts and (2) the threat of continued activity." Saglioccolo v. Eagle Ins. Co., 112 F.3d 226, 229 (6th Cir. 1997). In expanding on this second element of a RICO pattern, the Court stated:

> "Continuity" is both a closed- and open-ended concept, referring either to a closed period of repeated conduct, or to past conduct that by its nature projects into the future with a threat of repetition. It is, in either case, centrally a temporal concept. . . . A party alleging a RICO violation may demonstrate continuity over a closed period by proving a series of related predicates extending over a substantial period of time. Predicate acts extending over a few weeks or months and threatening no future criminal conduct do not satisfy this requirement: Congress was concerned in RICO with long-term criminal conduct.

H.J.,492 U.S. at 241-42. The above passage makes clear that racketeering activity occurring over only a short period of time cannot constitute a RICO pattern. See, e.g., Vemco, Inc. v. Camardella, 23 F.3d 129 (6th Cir. 1994)(continuity

requirement not met by a showing that predicate acts extended over a 17 month period).

Lexmark has alleged that Snowden participated in two thefts of SIMMS memory chips in violation of 18 U.S.C. § 659. Section 659, which imposes criminal sanctions upon those who steal goods in interstate shipment, is a listed predicate act under § 1961(1). Lexmark contends that the first theft occurred in January of 1996 when it discovered a number of SIMMs [sic] was missing from Building 006 where they were being stored. Unable to determine the identity of the responsible party, Lexmark installed the security video camera that, according to Lexmark, eventually caught Snowden stealing SIMMs [sic] in March of 1996. It is undisputed that Lexmark has no direct proof that Snowden participated in the January theft.

While Lexmark's allegations properly allege the occurrence of predicate acts, the two thefts from Building 006, standing alone, will not support a finding that Snowden engaged in a pattern of racketeering activity. Cognizant of H.J.'s "continuity" requirement, Defendant points to other alleged predicate acts. Lexmark argues that the operation of the enterprise involved in this case, an association-in-fact comprised of the Assassin's Guild, Scott Morris, Transylvania 286, and Snowden, violated 17 U.S.C. § 506(a) which criminalizes the willful infringement of copyrights for the purposes of commercial advantage or private financial gain. Those who violate § 506 are punished in accordance with 18 U.S.C. § 2319 which is included in § 1961(1)'s definition of racketeering activity. Despite this allegation, however, Lexmark's RICO counterclaim must still fail.

First, § 1962(c) liability attaches to those persons who conduct the affairs of an enterprise through a pattern of racketeering activity. See United States v. Diaz, 176 F.3d 52, 93 (2d Cir. 1999); Emery v. American General Finance, Inc., 938 F.Supp. 495, 499 (N.D. Ill. 1996)("It is clear that liability under RICO is limited to persons who have personally committed at least two predicate acts of racketeering. There is no vicarious liability under RICO.")(citations omitted). In other words, a plaintiff must show that it was the defendant, as opposed to the enterprise, that committed the acts of racketeering activity. Lexmark admits to having "no direct evidence as yet that Snowden downloaded pirated software from Assassin's Guild for posing [sic] on his own bulletin board." (Lexmark's Memorandum in Response to the Court's Memorandum and Order, at 4). Accordingly, Lexmark has filed with the Court a motion seeking additional discovery regarding this issue. However, as is discussed below, even if Lexmark had evidence that Snowden actively downloaded pirated software from the Assassin's Guild BBS, or from any other source, such proof would be unavailing.

The racketeering activity at issue is the alleged violation of 17 U.S.C. § 506 which is punishable as set forth in 18 U.S.C. § 2319. Section 2319 was added to RICO's list of predicate acts by the passing of public law 104-153 which amended § 1961(1) in 1996. However, although Snowden's BBS, Transylvania 286, operated until "the first quarter of 1996," (Snowden's Deposition, at 14) it is undisputed that the Assassin's Guild BBS ceased operations in April of 1995 when Scott Morris was sued by Microsoft and Novell. Consequently, Snowden maintains that the alleged violations of § 506 cannot be utilized in satisfying the continuity prong

of the pattern requirement imposed by RICO. He argues that to hold otherwise would be an improper retroactive application of the RICO statute.

Snowden's argument has merit. In Resolution Trust Corp. v. S&K Chevrolet, 868 F.Supp. 1047 (C.D. Ill. 1994), defendant S&K, a corporation engaged in the business of selling automobiles, was sued by its financing company, Security Savings and Loan Association ("Security"), for an alleged fraudulent scheme to secure financing for its customers. The alleged scheme was carried out from August 1987 through June 1988. In satisfying the pattern of racketeering activity requirement imposed under § 1962(c), Security claimed that S&K's scheme violated 18 U.S.C. § 1344 which criminalizes bank fraud. Pointing to the fact that § 1344 was not included in § 1961(1)'s exclusive list of racketeering activity until 1989, S&K argued that the 1989 amendment should not be retroactively applied.

Relying almost exclusively on the Supreme Court's decision in Landgraf v. USI Film Products, 511 U.S. 244 (1994), which reaffirmed the "deeply rooted" presumption against the retroactive application of statutes, the Illinois district court held that the 1989 amendment could not be applied retroactively. The court observed "that a court's first task when addressing the application of federal statute which was enacted after the occurrence of events pertinent to a suit is to 'determine whether Congress has expressly prescribed the statute's reach.'" Resolution Trust, 868 F.Supp. at 1062 (quoting Landgraf, 511 U.S. at 280). If Congress has done so, there is no need to resort to the judicial presumption mentioned above. If the statute in question fails to reflect Congress' intended reach, however, courts "must determine

whether the new statute would have retroactive effect, i.e., whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." Landgraf, 511 U.S. at 280. Notwithstanding the fact that § 1344 was "on the books," independent of RICO, prior to S&K's actions, the Resolution Trust Corp. court held that its application in the context of RICO "would increase the liability of [S&K] for their past conduct." Resolution Trust, 868 F.Supp. at 1062. Accordingly, the court dismissed plaintiff's RICO cause of action. The same analysis and result should be applied in the present case.

Lexmark counters by citing Wiener v. Napoli, 772 F. Supp. 109 (E.D.N.Y. 1991) which entails substantially the same scenario as that posed by Resolution Trust Corp. and the case sub judice. In fact, like the case in Resolution Trust Corp., the Wiener court was confronted with the application of § 1344, in the context of a civil RICO suit, to conduct that occurred prior to that statute's inclusion in § 1961(1). Unlike the Resolution Trust Corp. holding, however, the Wiener court found nothing wrong with applying § 1344 retroactively. However, the holding of that court, as was noted in Resolution Trust Corp., is highly suspect. Significantly, the court's decision predated the Supreme Court's opinion in Landgraf v. USI Film Products, 511 U.S. 244 (1994). Second, the Wiener court's decision relies largely on the Supreme Court's decision in Chevron Oil Co. v. Huson, 404 U.S. 97 (1971), a case governing the retroactive application of judicial decisions, as opposed to legislation, that are issued while a case is pending. Finally, the Wiener court's analysis "lacks any discussion of the increase in liability experienced by defendants as a result of retroactive

application of the 1989 amendments . . . and the potential constitutional problems associated with retroactive application of [RICO] amendments." Resolution Trust, 868 F.Supp. at 1063 n. 8.

Congress has not stated, expressly or otherwise, that the reach of the 1996 amendments should extend to conduct that occurred prior to 1996. To apply these amendments to Snowden's pre-1996 conduct would certainly create a retroactive effect in that it would significantly increase Snowden's liabilities, the most apparent of which would be the mandatory imposition of RICO's treble damages under § 1964(c). As the Landgraf Court noted: "If the statute would operate retroactively, our traditional presumption teaches that it does not govern . . . ." Id. at 280. A finding that the 1996 amendments do not govern in this case to Snowden's pre-1996 conduct, leaves Lexmark alleging only the January 1996 and March 1996 theft of SIMMS as predicate acts. But even if proven, these two acts, having occurred only months apart, cannot satisfy the pattern requirement imposed by RICO. Consequently, Snowden's motion for summary judgment is granted.

IV. State Claims

As noted above, both parties have remaining state claims. Because these state claims "form part of the same case or controversy" giving rise to Plaintiffs' [sic] federal claims, this Court may assume supplemental jurisdiction over them. See 28 U.S.C. § 1367(a)(1998). However, that same statute provides that a "district court may decline to exercise supplemental jurisdiction over a claim under subsection (a) if . . . the district court has dismissed all claims over which it

has original jurisdiction." Id. § 1367(c). While a district court has broad discretion in deciding whether to exercise supplemental jurisdiction, see Musson Theatrical, Inc. v. Federal Express Corp., 89 F.3d 1244, 1254 (6th Cir. 1996), considerations of "judicial economy, convenience, fairness, and comity," are all important factors. Id. Given the early disposition of this case, and the absence of any claimed prejudice by either party that may result in this Court's refusal to exercise its supplemental jurisdiction, the Court believes it best to stay its hand and remand this action back to Fayette Circuit Court.

V. Conclusion

According, [sic] **IT IS HEREBY ORDERED and ADJUDGED,**

1) that Plaintiffs' [sic] motion for summary judgment [Record No. 155] is **GRANTED;**

2) that Plaintiff's motion to remand [Record No. 167] is **DENIED as MOOT;**

3) that Defendant's motion to allow for additional discovery [Record No. 170] is **DENIED;**

and

4) that this matter be remanded back to Fayette Circuit Court for further proceedings.

This 6 day of August, 1999.

/s/_____
HENRY R. WILHOIT, JR., CHIEF JUDGE

APPENDIX C

18 § 1961. Definitions

As used in this chapter —

(1) "racketeering activity" means **(A)** any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act), which is chargeable under State law and punishable by imprisonment for more than one year; **(B)** any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1028 (relating to fraud and related activity in connection with identification documents), section 1029 (relating to fraud and related activity in connection with access devices), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1344 (relating to financial institution fraud), section 1425 (relating to the procurement of citizenship or nationalization unlawfully), section 1426 (relating to the reproduction of naturalization or citizenship papers), section 1427 (relating to the sale of naturalization or citizenship papers), sections 1461-1465 (relating to obscene matter), section 1503 (relating to

obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1512 (relating to tampering with a witness, victim, or an informant), section 1513 (relating to retaliating against a witness, victim, or an informant), section 1542 (relating to false statement in application and use of passport), section 1543 (relating to forgery or false use of passport), section 1544 (relating to misuse of passport), section 1546 (relating to fraud and misuse of visas, permits, and other documents), sections 1581-1588 (relating to peonage and slavery), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), section 1956 (relating to the laundering of monetary instruments), section 1957 (relating to engaging in monetary transactions in property derived from specified unlawful activity), section 1958 (relating to use of interstate commerce facilities in the commission of murder-for-hire), sections 2251, 225A, 2252, and 2260 (relating to sexual exploitation of children), sections 2312 and 2313 (relating to interstate transportation of stolen motor vehicles), sections 2314 and 2315 (relating to interstate transportation of stolen property), section 2318 (relating to trafficking in counterfeit labels for phonorecords, computer programs or computer program documentation or packaging and copies of motion pictures or other audiovisual works), section 2319 (relating to criminal infringement of a copyright), section 2319A (relating to unauthorized fixation of and trafficking in sound recordings, and music videos of live musical performances), section 2320 (relating to trafficking in goods

or services bearing counterfeit marks), section 2321 (relating to trafficking in certain motor vehicles or motor vehicle parts), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), (D) any offense involving fraud connected with a case under title 11 (except a case under section 157 of this title), fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act), punishable under any law of the United States, (E) any act which is indictable under the Currency and Foreign Transactions Reporting Act, or (F) any act which is indictable under the Immigration and Nationality Act, section 274 (relating to bringing in and harboring certain aliens), section 277 (relating to aiding or assisting certain aliens to enter the United States), or section 278 (relating to importation of alien for immoral purpose) if the act indictable under such section of such Act was committed for the purpose of financial gain;

(2) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof;

(3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

(6) "unlawful debt" means a debt **(A)** incurred or contracted in gambling activity which was in violation of the law of the United States, a State or political subdivision thereof, or which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury, and **(B)** which was incurred in connection with the business of gambling in violation of the law of the United States, a State or political subdivision thereof, or the business of lending money or a thing of value at a rate usurious under State or Federal law; where the usurious rate is at least twice the enforceable rate;

(7) "racketeering investigator" means any attorney or investigator so designated by the Attorney General and charged with the duty of enforcing or carrying into effect this chapter;

(8) "racketeering investigation" means any inquiry conducted by any racketeering investigator for the purpose of ascertaining whether any person has been involved in any violation of this chapter or of any final order, judgment, or

decree of any court of the United States, duly entered in any case or proceeding arising under this chapter;

(9) "documentary material" includes any book, paper, document, record, recording, or other material; and

(10) "Attorney General" includes the Attorney General of the United States, the Deputy Attorney General of the United States, the Associate Attorney General of the United States, any Assistant Attorney General of the United States, or any employee of the Department of Justice or any employee of any department or agency of the United States so designated by the Attorney General to carry out the powers conferred on the Attorney General by this chapter. Any department or agency so designated may use in investigations authorized by this chapter either the investigative provisions of this chapter or the investigative power of such department or agency otherwise conferred by law.

(2)

No. 00-1566

Supreme Court, U.S.
FILED
MAY 9 2001
OFFICE OF THE CLERK

In the
Supreme Court of the United States

LEXMARK INTERNATIONAL, INC.,

Petitioner,

v.

RONALD L. SNOWDEN,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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Counsel of Record for Respondent

STATEMENT OF THE CASE

The Respondent accepts the QUESTION PRESENTED, LIST OF PARTIES, APPENDIX, TABLE OF AUTHORITIES, OPINION BELOW, JURISDICTION AND STATEMENT OF THE CASE, as stated in its Petition, with the following exceptions:

1. There was no evidence linking Snowden with any theft of SIMMS, other than that which might have been inferred on March 9, 1966, this being the only predicate act to be considered under RICO. As the opinion of the Sixth Circuit indicated at p. 6a (Petition), "Lexmark's only proof of wrongdoing is the surveillance tape of the March theft." The Court stated why there may be a genuine issue of fact as to whether the March theft was from an "interstate shipment", but that Lexmark go the benefit of the doubt since this matter was decided on summary judgment.

In referring to other alleged theft of SIMMS, the Court stated in the next paragraph: "The same cannot be said for the other alleged theft. There is simply no evidence that Mr. Snowden stole Lexmark chips in January 1996."

2. The Sixth Circuit, at p. 7a (Petition), discussing the second predicate act required by the RICO Act [18 U.S.C. 1061 (5)], summarizes the evidence of the violation of the Copyright Statute (18 U.S.C. 2319):

> ...The only connection between Lexmark and the alleged infringement is its assertion that "It is logical to infer that at least some of the stolen SIMMS were utilized as components of the illegal BBSs" [Bulletin Board Services] and, "...It is also likely that stolen

> SIMMS were sold through Snowden's BBS". (emphasis added).

Thus, the Sixth Circuit aptly summarized the proof herein, indicating Lexmark's only proof of wrongdoing was the surveillance tape of the March theft, which would have, at best, constituted a violation of 18 U.S.C. §659 (Theft from Interstate Shipment). This established only one possible predicate act under RICO.

3. The Petitioner at p. 8, top of the page, states that:

> Since Snowden was, through the theft of computer chips, already subject to the RICO penalties, his exposure for the combination of theft and the copyright infringement remain the same following the effective date of the amendment.

Respondent believes this is either a misstatement or a misunderstanding of the application of RICO. The violation of 18 U.S.C. §659 on March 9, 1996, is the only possible event constituting a predicate act under RICO. This is clear from the Sixth Circuit's Opinion. This alone is not sufficient to in any way subject him to the RICO statute, as it requires a minimum of two violations [18 U.S.C. 1961(5)].

ARGUMENT

The Sixth Circuit Opinion correctly applied Landgraf v. USI Film Products, 511 U.S. 244, 128 L.Ed.2d 229, 114 S. Ct. 1483 (1994). The Court's Opinion dealt extensively with the issue of retroactive application.

I. THE SIXTH CIRCUIT PROPERLY APPLIED THE DICTATES OF LANDGRAF, AND SUBSTANTIVE DUE PROCESS IN FINDING THAT THE AMENDMENT TO RICO WAS NOT TO BE APPLIED RETROACTIVELY.

Landgraf, supra, was very instructive and useful to the Court in making its decision. Landgraf also involved the retroactive application of an amendment to an existing statute in a Civil Rights action. Therein the Court considered the scope of the 1991 Civil Rights Act, specifically §102 providing that the complaining party might recover compensatory and punitive damages and be entitled to a jury trial. The prior law allowed "only an amount equal to the wages the employee would have earned from the date of discharge to the date of reinstatement, along with lost fringe benefits," Landgraf, supra, at p. 1491. The Plaintiff in Landgraf, at p. 1493, attempted to argue that under §402(a):

> "Except as otherwise specifically provided, the act and the amendments made by this act shall take effect upon enactment." ...[This] would be superfluous unless it referred to §402(b) and 109(c), which provided for prospective application in limited contexts.

The Plaintiff thus argued that Congress had provided for and intended for prospective application of this amendment, i.e., it did apply to pending action or conduct prior to its effective date. Thus it is analogous to the Snowden matter. The Court rejected this argument and found that Congress, considering what is arguably a stronger statement on its position on retroactivity, did not

provide that the amendment should be applied retroactively.

The Sixth Circuit analyzed Lexmark's argument, and concluded that Congress did not express its intentions on retroactivity, and thus the dictates of Landgraf, supra, and fundamental fairness (substantive due process) dictate that this amendment should not be applied retroactively. Part of the Sixth Circuit's analogy is based on Lexmark's argument and citations regarding an *ex post facto* challenge. In its Sixth Circuit Brief, p. 19, Lexmark cited United States v. Campanale, 518 F.2d 352, 365 (9th Cir., 1975), citing the Senate Judiciary Committee on this issue that:

> One act in the pattern must be engaged in after the effective date of the legislation. This avoids the prohibition against *ex post facto* laws, and bills of attainder. Anyone who is engaged in the prohibited activities before the effective date of the legislation is on prior notice that only one further act may trigger the increased penalties and new remedies of this chapter. (emphasis added).

S. Rep. No. 91-617, at 158 (1969).

Thus, the Sixth Circuit found that if such an amendment was to "reach back in the same manner as the original legislation, then they too must have the safeguard of prior notice." Sixth Circuit Opinion, p. 10a (Petition).

Thus, the Sixth Circuit properly ruled that Congress had not expressed its intention as to retroactivity of this Amendment to the RICO Act, and that application as to Snowden would violate fundamental presumptions against retroactive application, based on concepts of substantive due process or prior notice.

II. APPLICATION OF THE AMENDMENT TO SNOWDEN WOULD RESULT IN:

> Impairing rights a party possessed when he acted, increasing a party's liability for past conduct, or imposing new penalties with respect to transactions already completed.

Landgraf, supra at 1504.

Like §102, 18 U.S.C. 1964(c), provides for "Threefold" damages and attorney fees for a civil violation of §1962 of the Act. In Landgraf, the amendment providing for additional compensatory damages was found to impair the rights a party possessed when it acted, or to increase the party's liability for past conduct, or to impose new duties with respect to the transactions completed (p. 1505). The Court should find likewise for awards of treble damages and attorney fees. Contrary to the Petitioner's assertion at p. 8 of its Petition, Snowden was not already subject to RICO penalties because of the alleged theft of computer chips alone (18 U.S.C. §659). 18 U.S.C. §1961(5) requires two acts of racketeering activity, referring to those acts defined in 18 U.S.C. §1961. (emphasis added). Thus, only with the inclusion of the infringement count (18 U.S.C. §2319) could there be any possible allegation of the required two predicate acts.

Petitioner devotes almost two pages (Petition, pp. 8 and 9) to Wiener v. Napoli, 772 F.Supp., 109 (E.D.N.Y. 1991). Respondent's research on this case's pedigree indicates only two cites, Resolution Trust Corp. v. S & K Chevrolet, 868 F.Supp. 1047 (C.D. Illinois 1994) and the Sixth Circuit's opinion herein. Both properly point out its deficiencies, and decline to follow it.

CONCLUSION

Thus, Respondent, Ronald Snowden, submits that both the law and the facts support the Opinion of the United States Sixth Circuit Court of Appeals herein. Landgraf, supra is an exhaustive and well-reasoned opinion which appears to Respondent to be a comprehensive analysis of the principles to be applied in this and like matters, and the Sixth Circuit correctly applied them. Thus, this Court should deny this Petition.

Respectfully submitted this the 9th day of May, 2001.

Charles W. Curry

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